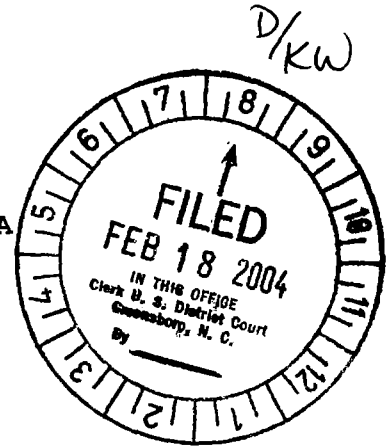


IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



BRYAN O'NEAL BENSON,

Plaintiff,

v.

CITY OF DURHAM,

Defendant.

1:04CV00157

ORDER AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Plaintiff seeks to proceed in forma pauperis. His affidavit shows that he is working and earns \$150.00 per week. Because plaintiff seeks to proceed in forma pauperis, the Court must examine the complaint to see whether it fails to state a claim upon which relief may be granted, seeks monetary relief from a defendant who is immune from such relief, or is frivolous or malicious. 28 U.S.C. § 1915(e). For frivolous or malicious review, the Court looks to see whether the complaint raises an indisputably meritless legal theory or is founded upon clearly baseless factual contentions, such as fantastic or delusional scenarios. Neitzke v. Williams, 490 U.S. 319, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). A plaintiff fails to state a claim when it appears certain that plaintiff cannot prove any set of facts which would entitle him or her to relief. The Court must accept all well-pled allegations and review the complaint in a light most favorable to plaintiff. Mylan Laboratories, Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993); cert. denied, 510 U.S. 1197, 114 S.Ct. 1307, 127 L.Ed.2d 658 (1994). Facts must be alleged with specificity. White v. White,

886 F.2d 721 (4th Cir. 1989). The Court may anticipate affirmative defenses which are clear on the face of the complaint. Todd v. Baskerville, 712 F.2d 70 (4th Cir. 1983); Nasim v. Warden, Md. House of Correction, 64 F.3d 951, 954 (4th Cir. 1995) (en banc), cert. denied, 516 U.S. 1177, 116 S.Ct. 1273, 134 L.Ed.2d 219 (1996) (court may apply common sense and reject fantastic allegations and/or rebut them with judicially noticed facts). Plaintiff does make \$150.00 per week and, thus, could save in order to pay the \$150.00 filing fee. However, this is not the sole basis for denying his request.

Plaintiff has brought this action against the City of Durham, claiming his constitutional rights were violated sometime in February 2004. He does not give any details concerning what action was taken that deprived him of his constitutional rights. Pursuant to Fed. R. Civ. P. 8, plaintiff must make a short and plain statement of the facts giving rise to his complaint and show that he is entitled to relief. In re Buffets, Inc. Securities Litigation, 906 F. Supp. 1293 (D. Minn. 1995). Plaintiff's complaint is wholly conclusory and does not show that he is entitled to relief. Therefore, he should not be allowed to proceed on this basis.

The third reason for denying plaintiff's motion to proceed as a pauper is the fact that he already has a pending lawsuit against the City of Durham in Benson v. City of Durham, No. 1:03CV1214. This case was transferred to this Court from the Eastern District of North Carolina. Therein, plaintiff also brought a suit against

the City of Durham, this time claiming that his automobile was illegally searched. While it is not certain that the instant case relates to the same facts, inasmuch as plaintiff fails to give a date concerning this incident. However, the combination of inadequate pleading and the fact that plaintiff wants to proceed as a pauper in both instances counsels against letting plaintiff proceed with the instant complaint until those matters have been sorted out.

Fourth, the complaint fails to show that the City of Durham would have any responsibility for the actions of its officers. See City of Canton, Ohio v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) (municipal liability). Plaintiff merely states that the City is being sued for some unidentified act of an officer. This fails to show municipal liability under Section 1983. Id.

IT IS THEREFORE ORDERED that plaintiff's request to proceed in forma pauperis is granted solely for the purpose of entering this Order and Recommendation, but is otherwise denied.

IT IS RECOMMENDED that this action be dismissed for being frivolous or malicious or for failing to state a cause of action upon which relief may be granted.


United States Magistrate Judge

February 18th, 2004